



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

MAY 10 2007

Reply To
Attn Of: ETPA - 083

Colonel Kevin J. Wilson, District Engineer
Alaska District, Corps of Engineers
P.O. Box 898
Anchorage, Alaska 99508-0898

ATTN: Chief, Regulatory Branch

RE: U.S. Environmental Protection Agency's Section 401 Water Quality Certification and Conditions for 2007 Nationwide Permit Re-issuance on Tribal Lands in Alaska.

Dear Colonel Wilson:

The U.S. Environmental Protection Agency (EPA) has completed its review of the Federal Register Notice dated March 12, 2007, to reissue existing Nationwide Permits (NWP), as well as issue six new NWPs. This review was conducted in response to the Corps' request to certify pursuant to Section 401 of the Clean Water Act (CWA) that there is reasonable assurance that the U.S. Department of Army's proposed additions and modifications of NWPs at Appendix A to 33 CFR Part 330, will not violate applicable provisions of CWA Section 301, 302, 306, and 307 on Tribal lands and lands with exclusive federal jurisdiction within the state of Alaska.

The following is EPA Region 10's position on Section 401 certification, partial certification with conditions, denial, and EPA general conditions for the Corps Nationwide Permit Program for Tribal lands in the state of Alaska. EPA's position is based on the National NWP guidelines, the Corps General Conditions, applicable nationwide to all NWPs, and the Alaska District's Regional Conditions, applicable to selected NWPs for the state of Alaska.

This letter constitutes the CWA Section 401 certification for the reissuance of all existing NWPs, general conditions, and definitions with some modifications and for the issuance of six new NWPs, two new general conditions, and 13 new definitions as described by the Corps of Engineers in the March 12, 2007 Federal Register. This Water Quality Certification is also based on the regional conditions as proposed in your September 29, 2006 public notice. We understand that you have not yet completed the final regional conditions for the reissued and new NWPs. If the final regional conditions are substantially different than originally proposed, we will need to consider re-certifying those affected NWPs. This certification applies to those discharges on tribal lands and those lands with exclusive Federal jurisdiction within the state of Alaska.

EPA Region 10's position on Section 401 Water Quality Certification for activities on Tribal

lands and lands with exclusive federal jurisdiction in the state of Alaska authorized by NWP is the following:

- Deny Section 401 water quality certification for NWPs (14), (16), (17), (21), (29), (33), (39), (40), (42), (43), (44), (45), (49), (50);
- Partially deny without prejudice (Conditioned) Section 401 water quality certification for NWPs (3), (5), (6), (12), (13), (23), (27);
- EPA certifies that all other NWPs and conditions, including the regional conditions proposed by the Seattle District, comply with the applicable provisions of the Clean Water Act provided you comply with the General Conditions (attached) which shall be included as enforceable conditions of the nationwide permits: (4), (7), (15), (18), (19), (20), (22), (24), (25), (30), (31), (32), (34), (36), (37), (38), (41), (46), (47), (48).

Tribes within the state of Alaska shall be notified of these final conditions by a copy of this letter. For clarification of EPA's final Section 401 water quality certifications of the Corps NWPs, please contact Phil North at (907) 260-4872.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael J. Szerlog".

Michael J. Szerlog, Unit Manager
Aquatic Resources Unit

Attachment

cc: EPA, Anchorage
EPA, Juneau
EPA, Soldotna
ADEC, Anchorage
Metlakatla Indian Community

Attachment
U.S. Environmental Protection Agency's (EPA)
Final Water Quality Conditions for Reissued Corps of
Engineers Nationwide Permits on Tribal Lands in Alaska

Final EPA General Conditions:

EPA General Condition "A" – Notification

For projects that require individual 401 certification determination, applicants must provide EPA with the same documentation provided to the Corps, including when applicable:

- Delineation of water of the United States, including wetlands.
- Proposed compensatory mitigation or restoration plans.
- Proposed water quality and water quantity management measures.
- Endangered or threatened listed species that may be affected by the proposed work.
- Historic properties listed or eligible for listing in the National Register of Historic Places.
- Site plans showing the 100-year floodplain.
- Other applicable requirements of Corps National General Condition #27, Corps Regional Conditions, or notification conditions of the applicable Nationwide Permit.

A request for 401 certification is not complete until the applicable documents above have been provided to the certifying agency.

EPA General Condition "B" – Soil Erosion and Sediment Controls

Individual 401 certification determination is based on the project or activity meeting turbidity levels established in Alaska water quality standards. Projects or activities that are expected to exceed these levels or that do exceed these levels will require individual 401 certification. The water quality standards allow a 5 NTU increase over background levels in waters where background levels are 50 NTU or less, and up to a 25 NTU increase for waters with turbidity over 50 NTUs.

EPA General Condition "C" – Temporary Fill

An individual 401 certification is required for any activity where temporary fill will remain in wetlands or other waterbodies for more than 90 days. The 90 day period begins when filling activity starts in the wetland or other waterbody.

EPA General Condition "D" – Mitigation

Individual 401 certification is based on adequate compensatory mitigation being provided for wetland and other water quality-related impacts of projects and activities authorized

under the NWP Program. Compensatory mitigation will be required for projects and activities authorized under NWPs #14, 17, 29, 39, 40 and 44. Individual 401 certification is subject to the applicant receiving written approval from EPA of the mitigation plan for projects and activities resulting in any of the following:

- any impacts to tidal waters or non-tidal waters adjacent to tidal waters (applies to NWP #14); or,
- any impacts to wetlands greater than $\frac{1}{4}$ acre.

Compensatory mitigation plans submitted for EPA review and approval shall, at a minimum, include the following:

- evidence of wetland hydrology at the mitigation site;
- met the mitigation planting success standard of 80 percent survival of each plant species planted, after five years;
- completion and submittal of an "as-built report" upon construction of the mitigation;
- completion and submittal of reports at years 3 and 5 showing the results of monitoring for wetland hydrology, vegetation types, and aerial coverage of vegetation.

Projects and activities that do not receive written approval of their mitigation plan, or do not meet the conditions stated above, will require an individual 401 certification.

NWP-SPECIFIC REGIONAL CONDITIONS

1. Aids to Navigation.

EPA 401 Certification – Not Applicable (Section 10).

2. Structures in Artificial Canals.

EPA 401 Certification – Not Applicable (Section 10).

3. Maintenance.

EPA 401 Certification - Partially denied without prejudice

1. Activities that require excavation or dredging in open water are denied certification.

4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.

EPA 401 Certification - Approved

5. Scientific Measurement Devices.

EPA 401 Certification – Partially denied without prejudice

1. Projects may not create fish migration barriers.
2. Intake structures must be designed to prevent fish entry.

6. Survey Activities.

EPA 401 Certification - Partially denied without prejudice

Exploratory trenching shall not occur in flowing water.

1. Exploratory trenching is limited to 500 linear feet or 0.10 acre at any one time before the areas are successfully restored.
2. Material resulting from exploratory trenching may be temporarily sidecast into waters of the United States except for open water for no more than 30 days, provided that the material is not placed in such a manner that it is dispersed by currents or other forces. No material shall be placed in open water.
3. When trenching through wetlands, the upper 12 inches of topsoil must be removed and stockpiled separately from subsurface soils. Care shall be taken to avoid compaction when stockpiling hydric soils. Once the exploratory trenching has been completed, subsurface soils shall be placed in the trench as backfill, followed by the topsoil as the final layer to restore the site to pre-construction contours. No more than 10 percent of subsurface soils may be mixed with the topsoil.
4. Exploratory trenches can not be constructed in such a manner as to drain waters or wetlands.
5. Disturbed areas must be replanted with native vegetation and stabilized until vegetative root mass can become established to minimize erosion and resultant sediment delivery to the aquatic environment

7. Outfall Structures and Associated Intake Structures.

EPA 401 Certification -Approved

8. Oil and Gas Structures on the Outer Continental Shelf

EPA 401 Certification – *Not Applicable (Section10).*

9. Structures in Fleeting and Anchorage Areas.

EPA 401 Certification – *Not Applicable (Section10).*

10. Mooring Buoys.

EPA 401 Certification – *Not Applicable (Section10).*

11. Temporary Recreational Structures.

EPA 401 Certification – *Not Applicable (Section10).*

12. Utility Line Activities.

EPA 401 Certification - Partially denied without prejudice

1. Any excavation or dredging activities affecting open water areas (e.g., trenching across streams), and all utility line substations are denied 401 certification.

13. Bank Stabilization.

EPA 401 Certification - Partially denied without prejudice

1. Projects in marine waters are denied 401 certification.

14. Linear Transportation Projects.

EPA 401 Certification - Denied

15. U.S. Coast Guard Approved Bridges.

EPA 401 Certification - Approved

16. Return Water from Upland Contained Disposal Areas.

EPA 401 Certification - Denied

17. Hydropower Projects.

EPA 401 Certification - Denied

18. Minor Discharges.

EPA 401 Certification - Approved

19. Minor Dredging.

EPA 401 Certification - Approved

20. Oil Spill Cleanup.

EPA 401 Certification - Approved

21. Surface Coal Mining Operations.

EPA 401 Certification - Denied

22. Removal of Vessels.

EPA 401 Certification - Approved

23. Approved Categorical Exclusions.

EPA 401 Certification - Partially denied without prejudice

1. Projects exceeding 300 linear feet or 0.10 acres in waters of the United States, including wetland are denied certification.

24. Indian Tribe or State Administered Section 404 Programs.

EPA 401 Certification - Approved

25. Structural Discharges.

EPA 401 Certification - Approved

26. [Reserved]

27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities

EPA 401 Certification – Partially denied without prejudice

1. Proposed aquatic habitat restoration, establishment and enhancement activities shall include a monitoring plan approved by EPA. This plan shall include reporting and shall identify any necessary maintenance activities.

28. Modifications of Existing Marinas.

EPA 401 Certification – *Not Applicable (Section 10)*.

29. Residential Developments.

EPA 401 Certification - Denied

30. Moist Soil Management for Wildlife.

EPA 401 Certification - Approved

31. Maintenance of Existing Flood Control Facilities.

EPA 401 Certification - Approved

32. Completed Enforcement Actions.

EPA 401 Certification - Approved

33. Temporary Construction, Access, and Dewatering.

EPA 401 Certification - Denied

34. Cranberry Production Activities.

EPA 401 Certification - Denied

35. Maintenance Dredging of Existing Basins.

EPA 401 Certification – Not Applicable (Section 10)

36. Boat Ramps.

EPA 401 Certification - Approved

37. Emergency Watershed Protection and Rehabilitation.

EPA 401 Certification - Approved

38. Cleanup of Hazardous and Toxic Waste.

EPA 401 Certification - Approved

39. Commercial and Institutional Developments.

EPA 401 Certification - Denied

40. Agricultural Activities.

EPA 401 Certification - Denied

41. Reshaping Existing Drainage Ditches.

EPA 401 Certification - Approved

42. Recreational Facilities.

EPA 401 Certification - Denied

43. Stormwater Management Facilities.

EPA 401 Certification - Denied

44. Mining Activities.

EPA 401 Certification - Denied

45. Repair of Uplands Damaged by Discrete Events.

EPA 401 Certification - Denied

46. Discharges in Ditches.

EPA 401 Certification - Approved

47. Pipeline Safety Program Designated Time Sensitive Inspections and Repairs.

EPA 401 Certification - Approved

48. Existing Commercial Shellfish Aquaculture Activities.

EPA 401 Certification - Approved

49. Coal Remining Activities.

EPA 401 Certification - Denied

50. Underground Coal Mining Activities.

EPA 401 Certification - Denied